No. 94-1654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

—v.—

KEEN A. UMBEHR,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF KANSAS, AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

INDEPENDENT CONTRACTORS DO NOT FORFEIT THEIR FIRST AMENDMENT RIGHT TO SPEAK OUT ON MATTERS OF PUBLIC CONCERN BY CONTRACTING WITH THE GOVERNMENT 7

A. The First Amendment Prohibits The Government From Conditioning The Receipt Of A Government Benefit On The Forfeiture Of Constitutional Rights 7

B. The Degree To Which A Contractor's Speech On Matters Of Public Concern Is Protected By The First Amendment Depends Upon Whether He May Be Considered The Equivalent Of A Salaried Public Employee 14

C. Respondent's Speech On Matters Of Public Concern Is Protected By The First Amendment Under Any Applicable Standard 16

D. The Government's Need To Control Its Own Operation Does Not Justify The Deprivation Of First Amendment Protection 18

Page

E. Cases Holding That Independent Contractors May Be Dismissed Because Of Their Political Affiliations, As Opposed To Their Speech, Are Distinguishable And Inapplicable 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Abercrombie v. City of Catoosa,
896 F.2d 1228 (10th Cir. 1990) 4, 15, 16

Blackburn v. City of Marshall,
42 F.3d 925 (5th Cir. 1995) 6, 12, 14, 15, 16

Branti v. Finkel,
445 U.S. 507 (1980) 20

Brown v. Glines,
444 U.S. 348 (1980) 10, 11

Buckley v. Valeo,
424 U.S. 1 (1976) 5

Carey v. Brown,
447 U.S. 455 (1980) 5, 8

Community for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 14

Connick v. Myers,
461 U.S. 138 (1983) 5, 7, 10, 12, 17

Copsey v. Swearingen,
36 F.3d 1336 (5th Cir. 1994) 6, 15, 17

Czurlanis v. Albanese,
721 F.2d 98 (3d Cir. 1983) 18

Downtown Auto Parks v. City of Milwaukee,
938 F.2d 705 (7th Cir.),
cert. denied, 502 U.S. 1005 (1991) 20

Elrod v. Burns,
427 U.S. 347 (1976) 20

Page

Garrison v. Louisiana,
379 U.S. 64 (1964) 8

Havekost v. United States Dep't of the Navy,
925 F.2d 316 (9th Cir. 1991) 10

Horn v. Kean,
796 F.2d 668 (3d Cir. 1986) 4, 20, 21

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 8, 9

Koch v. City of Hutchinson,
847 F.2d 1436 (10th Cir.),
cert. denied, 488 U.S. 909 (1988) 10

LaFalce v. Houston,
712 F.2d 292 (7th Cir. 1983),
cert. denied, 464 U.S. 1044 (1984) 4, 20, 21

Lefkowitz v. Turley,
414 U.S. 70 (1973) 9

McIntyre v. Ohio Elections Commission,
514 U.S. __, 115 S.Ct. 1511 (1995) 8

McKennon v. Nashville Banner Publishing Co.,
513 U.S. __, 115 S.Ct. 879 (1995) 19

McKinley v. City of Eloy,
705 F.2d 1110 (9th Cir. 1983) 10

Mills v. Alabama,
384 U.S. 214 (1966) 8

Mt. Healthy City School Dist. Bd. of Education v. Doyle,
429 U.S. 274 (1977) 9, 19

Page

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 5, 8

Nationwide Mutual Ins. Co. v. Darden,
503 U.S. 318 (1992) 14

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 11

Northern Mississippi Communications, Inc. v. Jones,
792 F.2d 1330 (5th Cir. 1986) 14

Perry v. Sindermann,
408 U.S. 593 (1972) 5, 9

Pickering v. Board of Education,
391 U.S. 563 (1968) . . . . . *passim*

Rankin v. McPherson,
483 U.S. 378 (1987) 10, 12, 17

Roth v. United States,
354 U.S. 476 (1957) 8

Roth v. Veteran's Administration,
856 F.2d 1401 (9th Cir. 1988) 18

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 9, 20, 21

Shapiro v. Thompson,
394 U.S. 618 (1969) 9

Sherbert v. Verner,
374 U.S. 398 (1963) 8

Smith v. Cleburne County Hospital,
870 F.2d 1375 (8th Cir.),
cert. denied, 493 U.S. 847 (1989) 6, 10, 15, 17, 18

Page

Speiser v. Randall,
357 U.S. 513 (1958) 8, 9

Stromberg v. California,
283 U.S. 359 (1931) 8

Sweeney v. Bond,
669 F.2d 542 (8th Cir.),
cert. denied, 459 U.S. 878 (1982) 4, 20

Thornhill v. Alabama,
310 U.S. 88 (1946) 10

Tinker v. Des Moines Independent Community School Dist.,
393 U.S. 503 (1969) 18

Triad Associates, Inc. v. Chicago Housing Authority,
892 F.2d 583 (7th Cir. 1989),
cert. denied, 498 U.S. 845 (1990) 21

United States v. National Treasury Employees Union,
513 U.S. __, 115 S.Ct. 1003 (1995) . . . 10, 12, 13, 14, 17

Walter v. Morton,
33 F.3d 1240 (10th Cir. 1994) 18

Waters v. Churchill,
511 U.S. __, 114 S.Ct. 1878 (1994) . . . . . *passim*

Wulf v. City of Wichita,
883 F.2d 842 (10th Cir. 1989) 10

Other Authorities

Restatement (Second) of Contracts (1981) 19

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members, and the ACLU of Kansas is one of its state affiliates. The ACLU was founded over seventy-five years ago to preserve and protect the fundamental principles of the Bill of Rights. Central to those principles is the First Amendment's guarantee of freedom of speech. The ACLU has appeared in numerous cases where the government has argued that the values protected by the First Amendment, including the right to speak out on matters of public concern, are outweighed by a compelling governmental interest that justifies suppression.

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. The Center has, since its opening in 1990, pursued that mission in various forms, including the filing of *amicus curiae* briefs in a number of cases, in both federal and state courts, that have involved free expression issues.

Amici believe that the maintenance of the opportunity for free and uninhibited discussion, particularly on matters of political concern, is a fundamental principle of our constitutional system and that governmental suppression of such speech by, among other things, retaliating against the speaker, is constitutionally impermissible except in rare and narrowly defined circumstances. We respectfully submit this brief in the hope of assisting the Court as it considers where the appropriate constitutional lines should be drawn in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

In early 1991, the Commissioners of Waubunsee County, Kansas, terminated a contract between the county and respondent Keen Umbehr, pursuant to which Mr. Umbehr had collected residential refuse for ten years from six rural communities located within the county.[2] *Umbehr v. McClure*, 44 F.3d 876, 877 (10th Cir. 1995). Shortly thereafter, Mr. Umbehr brought suit against the Commissioners in the United States District Court for the District of Kansas, alleging that they had terminated his contract in direct retaliation for his public criticisms of the County Commission.

Several years prior to the contract termination, Mr. Umbehr, who had always been actively involved in matters of concern to county residents, had begun to criticize the manner in which the County Commissioners fulfilled their job responsibilities. In letters to the editor of the county paper, in a weekly newspaper column in the same paper and at meetings of the County Commission, he expressed views concerning, among other things, landfill user rates, misuse of government property, mismanagement of taxpayer funds, closed-door sessions of the County Commission in violation of the state's open meeting statute, and the cost of obtaining county documents. *Id.*

Mr. Umbehr's letters, news columns and speeches attracted the attention of the Attorney General of Kansas, who initiated two different investigations into matters raised by

[2] Under the terms of the contract, Mr. Umbehr could haul trash for the six communities, provided each community endorsed and ratified the contract. No community was under any obligation to ratify the contract and each community had the right to opt out of the contract. *Umbehr v. McClure*, 44 F.3d at 877. After termination of his contract, Mr. Umbehr negotiated individual trash collection contracts with five of the communities. *Id.* at 878.

Mr. Umbehr, including: (1) the misuse of county equipment and taxpayer money, and (2) the Commission's violation of the state's open meetings statute. The first investigation concluded, among other things, that taxpayer funds and resources had been improperly used by county employees, and the second resulted in a Consent Agreement between the State and the County Commission pursuant to which the Commission agreed to abide by the state open meetings statute in the future. Letter from Kansas Attorney General to Waubunsee County Attorney, 12/29/89 (Defendants' (Appellees') Appendix, 157-59); Consent Agreement, 8/28/89 (Defendants' (Appellees') Appendix, 160-62).[3]

In May 1989, the Commissioners summoned to a meeting the editor of the paper that published Mr. Umbehr's letters and columns. During that meeting, one Commissioner suggested that the paper, which received significant revenue from its designation as the official county newspaper, "take a second look at what is put in the paper, to avoid anyone getting in trouble." Another, referring to Mr. Umbehr's articles, stated that he "would like to see some of this trash eliminated."[4] Minutes of County Commission's Meeting, 5/31/89 (Plaintiff's (Appellant's) Appendix, 92-93).

On December 30, 1993, the district court granted the County Commissioners' motion for summary judgment, relying on cases holding that the government could terminate

[3] Citations to Defendants' and Plaintiff's Appendices refer to appendices filed by the parties with the court of appeals.

[4] Petitioners' Brief contains a selective recitation of the facts. It ignores the findings of the Attorney General's investigations that were adverse to the Commission and makes no mention of the Commission's meetings with the newspaper. Instead, it implies that the Commission's only confrontation with Mr. Umbehr was over landfill rates and criticisms that Mr. Umbehr made of County Commissioners during an election campaign. Petitioners' Brief at 3-4.

independent contractors on the basis of political affiliation or support.[3] It reasoned that because the First Amendment did not protect independent contractors from dismissal based on political patronage, it also did not protect them from dismissal based on their exercise of free speech on matters of public concern. *Umbehr v. McClure*, 840 F.Supp. 837, 840-41 (D.Kan. 1993).

The court nevertheless noted that, if Mr. Umbehr had been a salaried public employee, the First Amendment would have protected him from adverse action unless the government were able to show, under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that his speech on matters of public concern impermissibly interfered with the government's ability to perform its public duties efficiently. It further assumed that Mr. Umbehr's allegations were true and that the Commissioners had terminated his contract in retaliation for his comments on matters of public importance. *Umbehr v. McClure*, 840 F.Supp. at 839.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit reversed the district court's judgment, following the court of appeal's own precedent in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), and rejected as both distinguishable and unpersuasive the patronage cases upon which the district court had relied. The court noted that this was a case in which the government had terminated an independent contractor not because of his political affiliation or support, but rather because of his speech on matters of public concern. It further held that the First Amendment did protect independent contractors against retaliation based on speech and remanded the case for resolution under the *Pickering* balancing test. *Umbehr v. McClure*, 44 F.3d at 878-79, 883-84.

This Court granted *certiorari* on June 29, 1995.

[3] These cases included *Horn v. Knox*, 796 F.2d 668 (3d Cir. 1986)(*en banc*); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); and *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982).

SUMMARY OF ARGUMENT

Speech on matters of public concern occupies the "'highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices . . . will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

This Court has long held that the government may not condition the receipt or retention of government benefits on an individual's forfeiture of the right to participate in the public debate. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Under a balancing test set forth in *Pickering v. Board of Education*, however, the government may sanction a public employee for speech on matters of public concern if the employee's speech impermissibly interferes with the government's legitimate interest in maintaining harmony and discipline in the workplace. 391 U.S. at 568; *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Waters v. Churchill*, 511 U.S. __, __, 114 S.Ct. 1878, 1884 (1994).

Here, the Court is asked to determine the extent to which the First Amendment protects statements on matters of public concern made by government benefit recipients, who may, in some circumstances, resemble salaried public employees -- independent government contractors. This question is both timely and important. As more and more government functions are turned over to private firms, the

number of independent government contractors will necessarily increase.

Petitioners ask this Court to adopt the district court's holding that independent contractor speech on matters of public concern is not protected by the First Amendment. *Umbehr v. McClure*, 840 F.Supp. at 840-41; Petitioners' Brief at 17-19. The court of appeals rejected this argument, 44 F.3d at 883, and so should this Court. "Every citizen enjoys the First Amendment's protections against governmental interference with free speech," *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995), even though those protections may be slightly different in the public employment context. If the government is permitted to curb critical political speech simply by privatizing government functions, the value of the First Amendment would be placed at grave risk.

As several circuit courts have noted, the degree to which a contractor's speech on matters of public concern is protected by the First Amendment should be determined by the nature of the contractor's relationship with the government. *See id.* at 932-33; *Copsey v. Swearingen*, 36 F.3d 1336, 1344 (5th Cir. 1994); *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1381 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989). Independent contractors should be presumed to have the same First Amendment right to contribute to the public debate as members of the general public unless it can be shown that they are the functional equivalent of public employees. If there is such functional equivalency, the level of First Amendment protection for contractors' statements should be determined by the balancing test set forth in *Pickering v. Board of Education*.

This approach is necessary because, where government contractors, like trash collectors and tow truck operators, do not work in government buildings with salaried public em-

ployees under the immediate daily supervision of government administrators, the government's justification for limiting First Amendment protection is absent. The relationship between these contractors and the government is sufficiently attenuated that the contractors' speech is no more likely to disrupt the daily functioning of a government office or undermine the authority of an immediate government supervisor than the speech of a member of the general public who may engage in political debate or criticize government conduct.

Consequently, unless the government can show that its relationship with a contractor is sufficiently similar to a public employment relationship to warrant application of the *Pickering* test, the government should be forbidden from retaliating against contractors for exercising their free speech rights on matters of public concern.

ARGUMENT

INDEPENDENT CONTRACTORS DO NOT FORFEIT THEIR FIRST AMENDMENT RIGHT TO SPEAK OUT ON MATTERS OF PUBLIC CONCERN BY CONTRACTING WITH THE GOVERNMENT

A. The First Amendment Prohibits The Government From Conditioning The Receipt Of A Government Benefit On The Forfeiture Of Constitutional Rights

Under the First Amendment, every member of our society has the right to express an opinion on issues of public significance. This Court has long recognized that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by people.'" *Connick v. Myers*, 461 U.S. at

145, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Consequently, speech on matters of public concern occupies the "'highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 913, quoting *Carey v. Brown*, 447 U.S. at 467.

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Stromberg v. California, 283 U.S. 359, 369 (1931). *See also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966)("[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs"); *McIntyre v. Ohio Elections Commission*, 514 U.S. __, __, 115 S.Ct. 1511, 1518 (1995)(political speech "occupies the core of the protection afforded by the First Amendment").

Recognizing that a true democracy requires that all members of society have the opportunity to participate in the national dialogue, this Court has consistently held that the government cannot condition the receipt or retention of government benefits on an individual's forfeiture of his right to participate in public debate. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958)(government cannot deny tax exemptions on the basis of speech); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963)(government cannot deny unemployment benefits on the basis of religious free exercise); *Keyishian v.*

Board of Regents, 385 U.S. 589, 605-09 (1967)(government cannot deny public employment on the basis of association); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)(government cannot deny welfare benefits on the basis of exercise of right to travel); *Perry v. Sindermann*, 408 U.S. at 597 (government cannot deny public employment on the basis of speech); *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 283 (1977)(same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990)(government cannot deny public employment on the basis of political affiliation); *see also Lefkowitz v. Turley*, 414 U.S. 70, 83-85 (1973)(government cannot threaten independent contractors with loss of contracts to compel them to waive Fifth Amendment right against self-incrimination).

As the Court noted in *Perry v. Sindermann*,

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom on speech. For if the government could deny a benefit to a person because of his constitutionally protected speech . . . his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

408 U.S. at 597, quoting *Speiser v. Randall*, 357 U.S. at 526.

This rule is somewhat different in the public employment context. Although salaried public employees do not

lose the right to participate in the public debate by accepting a paycheck from the government, their right to speak freely on matters of public concern[6] may be affected by the government's legitimate interest in maintaining discipline and harmony in the workplace and performing its public duties with efficiency and integrity. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987), citing *Pickering v. Board of Education*, 391 U.S. at 570-73; *Smith v. Cleburne County Hospital*, 870 F.2d at 1383. Under a balancing test initially set forth in *Pickering v. Board of Education*, the government may terminate a public employee for speaking out on matters of public importance if the government's interest in promoting "the efficiency of the public services it performs through its employees" outweighs the interests of the employee, "as a citizen, in commenting upon matters of public concern." 391 U.S. at 568. *See Connick v. Myers*, 461 U.S. at 140; *Waters v. Churchill*, 114 S.Ct. at 1884; *United States v. National Treasury Employees Union*, 513 U.S. __, __, 115 S.Ct. 1003, 1012-13 (1995); *see also Brown v. Glines*,

[6] For a discussion of the contours of "public concern," *see Rankin v. McPherson*, 483 U.S. at 395 (Scalia, J., dissenting). Many courts have focused on the extent to which the employee speech was calculated to disclose wrongdoing, inefficiency or some other malfeasance on the part of government officials. *Koch v. City of Hutchinson*, 847 F.2d 1436, 1445-46 & n.17 (10th Cir.)(*en banc*), *cert. denied*, 488 U.S. 909 (1988). *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)(defining public speech as speech on "'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government"), quoting *Thornhill v. Alabama*, 310 U.S. 88, 192 (1946). *Cf. Havekost v. United States Dep't of the Navy*, 925 F.2d 316, 318 (9th Cir. 1991) (workplace grievances and individual personnel disputes that are of no relevance to the public's evaluation of the performance of governmental agencies are not protected). *See also Wulf v. City of Wichita*, 883 F.2d 842, 860 n.26 (10th Cir. 1989)(the fact that speech on a matter of public concern arose in the context of a personnel dispute does not deprive it of its First Amendment protection).

444 U.S. 348, 356 n.13 (1980)(government's ability to suppress speech is limited to that which is "reasonably necessary to promote effective government").

Petitioners ask that the rule against the imposition of unconstitutional conditions on the receipt of government benefits be further altered to create, essentially, an independent contractor exception to the First Amendment. They argue that, because local governments need broad powers to control their own operations, such governments should be permitted to terminate contractors in retaliation for speech on matters of public concern without applying the *Pickering* test. Petitioners' Brief at 17-19. Alternatively, they argue, in apparent reliance on a misreading of *Waters v. Churchill*, that the *Pickering* test should be modified to permit the government to terminate a contractor for participating in public debate as long as a reasonable public official could conclude that termination served the public interest. Petitioners' Brief at 10, 26-34.

Given our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), both arguments should be rejected for the following reasons.[7] First, there is no justification for providing independent government contractors with *less* First Amendment protection than both the general public and salaried public employees. As the Fifth Circuit noted in

[7] Because the speech for which Mr. Umbehr was punished so clearly involved matters of public concern (the use of taxpayer funds, the manner in which the County Commission held its meetings, etc.), the Court need not decide whether the First Amendment also bars the government from requiring relinquishment of other forms of constitutionally protected speech in exchange for the receipt or retention of a government benefit. But certainly, for example, the government should not be permitted to retaliate against a contractor for engaging in artistic expression on his own time, even if his art is not to the government's taste.

rejecting arguments similar to those of petitioners:

> The district court's reasoning is inverted. Every citizen enjoys the First Amendment's protections against governmental interference with free speech, but the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship . . . . Outside the somewhat expanded context of public employment under *Pickering* [*v. Board of Education*] and *Connick* [*v. Myers*], a court generally examines a free speech claim under the more First Amendment friendly standard enunciated in *Perry* [*v. Sindermann*].

Blackburn v. City of Marshall, 42 F.3d at 931-32. *See also Umbehr v. McClure*, 44 F.3d at 883 ("the presumed differences between the status of independent contractors and employees . . . [does not] explain why independent contractors should be given less First Amendment protection than either ordinary citizens or government employees").

While the government, as employer, should be able to limit speech that prevents a salaried public employee from performing a job by taking him away from the office, *see Rankin v. McPherson*, 483 U.S. at 388, the same is not true of independent contractors, such as trash collectors and tow truck operators, who work on their own time and are paid only for the hours they devote to the job. How these contractors spend the rest of their time is of no concern to the government as long as the job gets done.

While the government, as employer, may be able to restrain employee speech that may result in "immediate workplace disruption," by destroying close working relationships with other government employees or undermining supervisory authority, *see Connick v. Myers*, 461 U.S. at 154; *United States v. National Treasury Employees Union*, 115 S.Ct. at

1012-14, this restraint is not justified when applied to independent contractors who are infrequently at the government workplace or office, and do not have close working relationships with salaried public employees. Such contractors are seldom, if ever, likely to create "immediate workplace disruption."

And, while the speech of high-level, policymaking government employees may be curbed if it impermissibly undermines citizen trust and confidence in the government, *see Waters v. Churchill*, 114 S.Ct. at 1186, that rationale does not extend to contractors whose relationship with the government is sufficiently attenuated that they are not viewed as government representatives. Such contractors, by definition, speak for themselves.

Second, *Waters* supports neither abandonment of the *Pickering* balancing test nor modification of that test to a mere "reasonable" or "rational basis" test. Instead, it reaffirms the *Pickering* rule that the government may force an employee to relinquish free speech rights only if the employee's speech materially interferes with the efficiency of the public service, and clarifies that material interference must be judged by the standard of a reasonable supervisor. 114 S.Ct. at 1889. *See United States v. National Treasury Employees Union*, 115 S.Ct. at 1020-21 (O'Connor, J., concurring and dissenting in part).

Given the breadth and volume of benefits distributed by federal, state and local governments, including not only employment contracts, but also grants, licenses, jobs, tax exemptions, social security, welfare benefits, medical services, advertising and access to public property, among others, any weakening of this Court's longstanding rule against the imposition of conditions on the receipt of benefits would have a devastating impact on free speech and the functioning of the democratic process. Indeed, it would permit the govern-

ment to subdue the willingness of citizens to speak out on matters of political concern, thereby "produc[ing] a result" -- the suppression of political information and ideas -- that it "could not command directly." *Id.* *See also Blackburn v. City of Marshall*, 42 F.3d at 931-33; *Northern Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).

B. The Degree To Which A Contractor's Speech On Matters Of Public Concern Is Protected By The First Amendment Depends Upon Whether He May Be Considered The Equivalent Of A Salaried Public Employee

Because independent contractors are like other recipients of government benefits, they should not be forced to relinquish their First Amendment right to contribute to the public debate as a condition of retaining their contracts unless it can be shown that they are the functional equivalent of public employees. Even if a contractor's relationship with the government is such that he constitutes a "quasi-public employee," he should be afforded the same First Amendment protection as a public employee, and the degree to which his statements on matters of public concern are constitutionally protected should be determined by the *Pickering* test.[8]

A number of circuit courts have adopted the standard proposed herein, holding that the nature of the contractor's relationship with the government determines the degree to

[8] Courts are frequently asked to decide whether an individual constitutes an employee or an independent contractor in a variety of different contexts. *See, e.g., Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992)(taxation); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(copyright).

which the contractor's statements are constitutionally protected. *See Blackburn v. City of Marshall*, 42 F.3d at 932-33; *Copsey v. Swearingen*, 36 F.3d at 1343-44; *Smith v. Cleburne County Hospital*, 870 F.2d at 1381. In *Blackburn*, for example, the Fifth Circuit held that the owner of a towing and wrecking service used by the city to remove cars from accident sites was entitled to the same First Amendment protection as that of any other recipient of a government benefit. He did not constitute a "quasi-public employee." 42 F.3d at 929, 934. *See also Abercrombie v. City of Catoosa*, 896 F.2d at 1233 (same).

Where a contractor does not work in a government office building with salaried public employees under the daily supervision of a government administrator, the justification for the *Pickering* balancing test is absent, and the contractor should be treated no differently than a member of the general public. On the other hand, in *Smith*, 870 F.2d at 1381, the Eighth Circuit applied the *Pickering* test to statements made by a doctor working at a county hospital after finding that the doctor's relationship to the hospital was similar to a public employment relationship. The doctor was required to perform regular duties at the hospital, reported to hospital administrators and worked closely with salaried hospital employees. *See also Copsey v. Swearingen*, 36 F.3d at 1344 (applying the *Pickering* test to statements made by a vendor who operated a concession stand in Louisiana's state capitol building pursuant to a licensing program for the blind because he was trained by the state, his vending space was owned by the state, and the state furnished him with substantial equipment and inventory).

To accord independent contractors any less First Amendment protection would be injurious to the democratic process. Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-

government. As this Court has noted, those who work for or with the government "are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 114 S.Ct. at 1887, citing *Pickering v. Board of Education*, 391 U.S. at 572.

C. Respondent's Speech On Matters Of Public Concern Is Protected By The First Amendment Under Any Applicable Standard

Although the court of appeals correctly reversed the district court's holding that Mr. Umbehr forfeited all his First Amendment rights when he contracted to haul trash for the local government, it incorrectly evaluated Mr. Umbehr's First Amendment rights under the *Pickering* test. Like the tow truck operators in *Blackburn* and *Abercrombie*, Mr. Umbehr operated without government supervision, did not work in a government building, had no daily contact with salaried government employees, and did not hold himself out as a government spokesperson or representative. As petitioners note, he "was free to decide how many trucks to operate, how many employees to hire, what wages to pay, the schedules to be followed in collecting trash from residential customers, and the means of disposing of the accumulated refuse." Petitioners' Brief at 19. The communities for which he collected trash were at liberty to reject his services.

Accordingly, Mr. Umbehr had no greater opportunity to disrupt the functioning of a government office or influence its morale than a member of the general public. His speech should have been afforded the same First Amendment protection as that of any other citizen, and petitioners should be prohibited from terminating his contract in retaliation for his speech on matters of public concern, regardless of their interest in avoiding annoyance, embarrassment or "disruption."

Should the Court decide, however, that Mr. Umbehr was sufficiently like a public employee that the *Pickering* balancing test should apply, the balance should tip in Mr. Umbehr's favor. In cases applying *Pickering*, the government's interest in efficiency has been found to outweigh the employer's free speech interest only if the speech disrupts or threatens to disrupt the employee's ability to perform his work, his relationships with his co-workers or immediate superiors, or the daily efficiency of the workplace.[9] *See, e.g.*, *Pickering v. Board of Education*, 391 U.S. at 569-70 (statements by public school teacher were protected because they were "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher"); *Connick v. Myers*, 461 U.S. at 154 (statements by assistant district attorney that disrupted office, undermined district attorney's authority and destroyed close working relationships were not protected); *Rankin v. McPherson*, 483 U.S. at 389-91 (statement by secretary in county constable's office concerning assassination of president was protected because it did not interfere with efficiency of office or employee's ability to do her job); *Waters v. Churchill*, 114 S.Ct. at 1890-91 (statements by nurse at a public hospital that undermined authority of her immediate supervisor were not protected); *Copsey v. Swearingen*, 36 F.3d at 1346 (statements by government vendor were protected because they did not relate to ongoing operation of the vendor's stand, or to his day-to-day interaction with government); *Smith v. Cleburne County Hospital*, 870

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[9] While the Court has given substantial weight to a government employer's predictions of disruption, it has also found that those predictions must be based upon an assessment of the facts that a neutral fact finder would consider reasonable, *Waters v. Churchill*, 114 S.Ct. at 1889, and may not be conjectural. *United States v. National Treasury Employees Union*, 115 S.Ct. at 1017.

F.2d at 1383 (statements by doctor in a public hospital were not protected because they went beyond matters of public concern and constituted personal attacks against administrators, nursing staff and other personnel that were disruptive to hospital's day-to-day management).

Mr. Umbehr's statements did not affect his ability to collect trash and, because he had no public employee coworkers or supervisors, did not disrupt office dynamics or workplace harmony. Instead, they took issue with administrative decisions made by the County Commission and, in certain instances, exposed government wrongdoings. Courts have refused to tip the *Pickering* balance in the government's favor if its only interest is "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969), or to avoid the disruption necessarily caused by an employee exposing government fraud or corruption. *See Pickering v. Board of Education*, 391 U.S. at 572; *Waters v. Churchill*, 114 S.Ct. at 1887; *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir. 1994); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1404-08 (9th Cir. 1988); *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983).

D. The Government's Need To Control Its Own Operation Does Not Justify The Deprivation Of First Amendment Protection

Petitioners' asserted fears that protecting an independent contractor against retaliation for speech will permit contractors to control government decisions or run government agencies for their own economic gain are unfounded. Regardless of the degree of First Amendment protection afforded to independent contractors, the government is still entitled to exercise the same rights and remedies that it has

in any contractual situation, as long as it does not do so for unconstitutional reasons. It still may dictate which government functions should be performed by contractors as opposed to salaried employees, establish the contract terms, and modify and/or terminate the contracts for any reason that does not infringe upon a contractor's constitutional rights and is consistent with the contract, including nonperformance, frustration of purpose, or a change in policy. *See* Restatement (Second) of Contracts, §§231-272 (1981).

In addition, under *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. at 286-87, once a contractor establishes that his speech was a substantial factor in the adverse action taken against him, the government may still avoid liability by showing that it would have taken the same action even in the absence of the protected speech.[10] Thus, protecting contractors against retaliation for their speech on public issues hardly inhibits government's ability to function efficiently and terminate contracts for legitimate reasons.

E. Cases Holding That Independent Contractors May Be Dismissed Because Of Their Political Affiliations, As Opposed To Their Speech, Are Distinguishable And Inapplicable

The district court adopted petitioners' arguments and held that the government may terminate an independent contractor for speaking out on matters of public concern, rely-

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[10] These other reasons must have played a part in the government's decision at the time that it was made. Evidence acquired or rationales developed after termination will not suffice. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. __, __, 115 S.Ct. 879, 883-85 (1995). Although petitioners rely on *McKennon* to assert that later-acquired evidence should relieve government of liability, Petitioners' Brief at 33, *McKennon* rejected precisely this argument. 115 S.Ct. at 883-85.

ing on cases from various circuit courts holding that the government may terminate a contractor because of political affiliation. *Umbehr v. McClure*, 840 F.Supp. at 839-40, citing *Downtown Auto Parks v. City of Milwaukee*, 938 F.2d 705, 709 n.5 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986)(*en banc*); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982). As the court of appeals found, these patronage cases are both distinguishable from and inapplicable to the case at hand. *Umbehr v. McClure*, 44 F.3d at 883.

First, as petitioners acknowledge and the court of appeals found, Mr. Umbehr was never threatened with dismissal because of his political associations. Petitioners' Brief at 15. Thus, the government's interest in the maintenance of the patronage system -- the stability of the two-party system, or the ability to bestow policymaking jobs on party supporters -- is not implicated. *See Elrod v. Burns*, 427 U.S. 347, 368 (1976); *Rutan v. Republic Party*, 497 U.S. at 104-07 (Scalia, J., dissenting).

Second, these cases underestimate the interest of contractors such as Mr. Umbehr in retaining their relationship with the government. Although this Court has never ruled on whether the First Amendment protects independent contractors from termination based on political affiliation, it has repeatedly found that the First Amendment protects non-policymaking public employees from such retaliation. *See Elrod v. Burns*, 427 U.S. at 362-63 (plurality opinion) and 375 (Stewart, J., concurring); *Branti v. Finkel*, 445 U.S. 507, 515-17 (1980); *Rutan v. Republican Party*, 497 U.S. at 78-79. Some circuit courts have refused to extend these rulings to independent contractors, finding that an independent contractor's First Amendment interests are not as strong as those of a public employee because the loss of a contract

is less devastating to a contractor than the loss of a job is to a public employee. *Horn v. Kean*, 796 F.2d at 675 n.9; *LaFalce v. Houston*, 712 F.2d at 294. *See also Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583, 587-88 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990).

While this may be true for some contractors, many contractors, such as Mr. Umbehr, only contract with the government. Consequently, the loss of a government contract can mean the loss of the contractor's livelihood. *See Rutan v. Republican Party*, 497 U.S. at 77 ("denial of a state job is a serious deprivation"). Moreover, to use an individual's economic status to determine whether his First Amendment rights were violated undermines the principles behind the freedoms of speech, belief and association:

> The constitutional wrong condemned in *Elrod* and *Branti* was the state's attempt to control the beliefs and associations of its citizens. That control can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent . . . . While independent contractors may not lose all their income if a state contract is withdrawn, the knowledge that their income would drop by ten percent may be sufficient to induce the contractors to conform their political views to those of the reigning power.

Horn v. Kean, 796 F.2d at 683 (Gibbons, C.J., dissenting)(citations omitted). *See Umbehr v. McClure*, 44 F.3d at 883 ("[i]n this First Amendment context, we reject any categorical distinctions based on whether independent contractors have more or less of an economic interest in their governmental contracts").

Thus, the patronage cases cannot be used to justify gov-

ernment retaliation against independent contractors for exercising their First Amendment right to speak freely on issues of public concern.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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